

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

STEVE S. SHAYA,

Defendant-Appellant.

UNPUBLISHED

June 6, 2006

No. 258376

Wayne Circuit Court

LC No. 01-008591

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

Defendant was convicted of false pretenses over \$20,000, MCL 750.218(5)(a), and sentenced to five years' probation. Defendant moved for a new trial, asserting ineffective assistance of counsel and prosecutorial misconduct as the basis of his motion. The trial court granted his motion on both grounds. In a prior appeal by the prosecutor, this Court reversed the trial court's decision and remanded for an evidentiary hearing regarding defendant's motion for a new trial. *People v Shaya*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2004 (Docket No. 245877). On remand, the trial court denied defendant's motion for a new trial, finding that neither ineffective assistance of counsel nor prosecutorial misconduct had been established. Defendant's motion for reconsideration was also denied. Defendant appeals as of right the trial court's determination that trial counsel was not ineffective. We affirm.

In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). This Court will not second-guess counsel on matters of trial strategy. *People v Knapp*, 244 Mich App 361, 386 n 7; 624 NW2d 227 (2001). "[E]ven if defense counsel was ultimately mistaken [with respect to a strategic decision], this Court will not assess counsel's competence with the benefit of hindsight." *Id.*, quoting *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

We cannot conclude that defendant's counsel was ineffective such that defendant is entitled to a new trial. Defendant argues that counsel should have offered the "original" Certificate of Acceptance and the July 1, 1999, letter to refute the prosecutor's theory of the case that the Certificate of Acceptance was invalid or fraudulent. We disagree. We fail to see how trial counsel's presentation of the alleged "original" certificate would have assisted defendant's defense. Nothing in the record supports the assertion that this alleged "original" document was legitimate. Moreover, whether the certificate was actually issued by the city was irrelevant to the defense theory that defendant was not involved in the fraud against Najor. Further, if the "original" had been introduced as evidence at trial, trial counsel would have been required to then introduce evidence explaining how defendant came into possession of the "original" when there was no copy in the city's files. Evidence establishing a link between defendant and the alleged original certificate would have conflicted with trial counsel's theory that defendant was not personally responsible for the charged fraud. Thus, trial counsel's failure to introduce the alleged "original" certificate into evidence was not objectively unreasonable.

Additionally, we cannot conclude that it was objectively unreasonable for trial counsel to decide not to introduce into evidence the July 1, 1999, letter from the City Building department to defendant. Contrary to defendant's arguments on appeal, the letter did not prove that a legitimate certificate was issued by the city. Aquil, who wrote the letter, testified that the city had no record that a legitimate certificate was ever issued and that the letter was written to ensure that if defendant had a certificate and believed it to be legitimate, he was aware that the City did not consider the certificate to be operative. Further, the evidence supported the view that a certificate should not have issued in this case.

Considering the record evidence, we conclude there is no reasonable probability that introduction of the July 1, 1999 letter by defense counsel would have changed the outcome of the trial. The prosecution's theory of the case was that defendant represented to Najor that the job was completed, that he did so in order to secure the final payment, that the job was not completed, and that defendant knew this. Whether a certificate had been issued and then cancelled by the City's July 1, 1999 letter was irrelevant to the prosecution's theory that defendant knew the job was not complete when he secured final payment from Najor. Thus, trial counsel's decision not to present documents to support the legitimacy of the certificate did not render counsel ineffective. Defendant has not met his burden of proving his claim. *Stanaway, supra*.

In reaching our conclusion, we note that trial counsel provided a valid trial defense. His theory was that Hartman committed the fraud. He cross-examined Najor about his prior testimony that Hartman had presented the Certificate of Acceptance and said that the job was completed. Defendant's counsel relied on the prior testimony, Najor's credibility deficits, and the prosecutor's lack of proof that defendant cashed the checks or otherwise profited. We will not second guess counsel's trial strategy with hindsight, *Rice, supra*, and we find that defendant was not deprived of a substantial defense.

We also reject defendant's claim that this case is like *People v Grant*, 470 Mich 477; 684 NW2d 686 (2004). In that case, the defendant's counsel failed to investigate and substantiate the defendant's primary theory of defense by interviewing known witnesses to determine if they had direct evidence to support the claim that the victim's injuries were caused by a bicycle accident and not sexual abuse. *Id.* at 480, 487, 492. This conduct was found to be objectively

unreasonable, because while defendant's counsel chose a good strategy, he failed to fortify that strategy with evidence that could have reasonably been obtained. *Id.* at 492. Additionally, the Court found that a reasonable probability of acquittal existed if counsel had substantiated the defendant's defense, because the missing evidence, which could have been discovered by a reasonable investigation, would have directly refuted the allegations of sexual abuse. *Id.* at 497.

Here, the issuance of the Certificate of Acceptance would not have refuted the elements of the charged crime because defendant did not complete the job, and knew that he did not complete it. Nevertheless, he represented by his words and acts that the job was complete in order to obtain the final payment. Najor made the payment based on defendant's representations and was damaged by doing so. The elements of the crime were proven beyond a reasonable doubt.

Affirmed.

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

/s/ Harold Hood